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No. 50

In the Supreme Court of the United States

OCTOBER TERM 1961

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an Unincorporated Association, *Petitioner*,

vs.

LUCAS FLOUR COMPANY, a Washington Corporation, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATUTORY AND CONSTITUTIONAL PROVISIONS

Petitioner refers only to the Labor-Management Relations Act of 1947, as amended. Also involved in this case are:

Article IV, Section 2, Washington State Constitution, which reads in part as follows:

> "The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court."

Revised Code of Washington 2.04.120, which is as follows:

> "*Two departments — Quorum.* There shall be two departments of the supreme court, denominated respectively department one and department two. The chief justice shall assign four of the as-

sociate judges to each department and such assignment may be changed by him from time to time: *Provided,* That the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the chief justice. The chief justice may sit in either department and shall preside when so sitting, but the judges assigned to each department shall select one of their number as presiding judge. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court en banc. The presence of three judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of three judges shall be necessary to pronounce a decision in each department: *Provided,* That if three do not concur, the cause shall be reheard in the same department or transmitted to the other department, or to the court en banc."

Revised Code of Washington 2.04.160, which is as follows:

"*Finality of departmental decision — Rehearings.* The decision of a department, except in cases otherwise ordered as hereinafter provided, shall not become final until thirty days after the filing thereof, during which period a petition for rehearing, or for a hearing en banc, may be filed, the filing of either of which, except as hereinafter otherwise provided, shall have the effect of suspending such decision until the same shall have been disposed of. If no such petition be filed the decision of a

department shall become final thirty days from the date of its filing, unless during such thirty-day period an order for a hearing en banc shall have been made: *Provided*, That if for any cause the chief justice or a majority of the department rendering any decision shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect, and a judgment issue thereon, any time after its filing an dprior to such thirty?day period, upon being in writing approved by the chief justice and any two associate judges who took no part in rendering such decision. The effect of granting a petition and prior to such thirty day period, upon being for a rehearing, or of ordering a cause once decided by department to be heard en banc, shall be to vacate and set aside the decision. Whenever a decision shall become final, as herein provided, a judgment shall issue thereon."

Rule 50, Rules on Appeal, 34A Wn.(2d) 55, reads in part as follows:

"Any party to an appealed case may, after an opinion has been filed, present to the court, in the manner and time as hereinafter provided, a petition for rehearing."

QUESTIONS PRESENTED

1. Should this Court review the decision of a department of the Supreme Court of Washington, from which decision petitioner did not seek relief *en banc*?

2. Where conduct of a labor union, found by a state court to be tortious, is obviously neither protected by nor condemned by Federal law, may the state court entertain an action for damages arising out of such conduct?

3. Does Federal labor legislation deprive state courts of jurisdiction of cases involving breach of collective bargaining agreements? That is, does Section 301 of the Taft-Hartley Act (granting Federal courts jurisdiction of suits for breach of collective bargaining agreements) deprive the states of such authority or limit the law they may apply in such cases?

STATEMENT OF THE CASE

This case was tried on stipulated facts, and petitioner's "Statement of Facts" is therefore largely irrelevant. To quote the trial judge (R. 158):

> "It is clear from the voluntary approval of the parties to the record of arbitration that the parties intended to be bound by the results of the arbitration. . . .
>
> "The case was presented to this court on the basis that the facts found by the arbitrators and set forth in the award of arbitrators are binding and conclusive upon this court."

The record of arbitration (Pl. Ex. 11, R. 209, 210) states:

> "It is further stipulated and agreed that the decision of the three arbitrators when reached shall be final and binding upon all parties hereto. . . . ; Provided, That: in the event the arbitrators are at variance in deciding any issue, the unanimous decision of any two of said arbitrators on said issue shall be final and binding on the parties as to that issue."

The essential facts are therefore not petitioner's carefully selected bits of the trial record to support its

unilateral view of what happened, but rather what the arbitrators decided. Insofar as relevant here, the arbitrators made the following decision (Pl. Ex. 12, R. 211 *et seq.*):

Melvin T. Welsch was employed by respondent company in 1953, first as a truck driver and then as a warehouseman (R. 212, 213). He was incompetent in both capacities. On one or more occasions respondent was so dissatisfied with Welsch's services that Welsch was fired, but was reinstated because petitioner union threatened to strike (R. 213, 214), this in spite of the fact that under its contract with the union respondent had a right to discharge an employee whose services were unsatisfactory. In May, 1958, Welsch started a new fork lift truck while it was in gear, and ran it off respondent's loading platform onto the railroad tracks, with resulting damage to the truck and some injury to himself. Welsch was fired when he tried to return to work on May 27, 1958 (R. 214-216). The discharge was fully justified; Welsch's work was unsatisfactory, there was a reasonable basis for the employer's dissatisfaction, and respondent acted in good faith in discharging him (R. 217, 218). The strike followed immediately (and, incidentally, involved much more than the "one-man picket" petitioner refers to in its brief; see R. 41, 42, 43, 44).

SUMMARY OF ARGUMENT

It is respondent's position that this Court should not review the Supreme Court of Washington's decision at all, because petitioner failed to avail itself of the remedy of seeking a hearing by that court sitting *en*

banc. Such a procedure is authorized by the Washington Constitution and statutes, and as a matter of policy this Court does not entertain proceedings to review unless all remedies are exhausted below.

It is further respondent's position that if the Washington courts ruled on the basis of tortious activity by petitioner union, that activity was not arguably protected by or condemned by Federal law. This Court has held that state courts must decline jurisdiction of matters involving labor relations affecting interstate commerce and defer to the National Labor Relations Board whenever the complained-of activity is either protected or condemned by Federal labor law, and this Court has further stated that if such activity is even "arguably" so protected or condemned, then the National Labor Relations Board is the proper tribunal to determine the questions presented, at least in the first instance. However this Court has *not* ruled, as petitioner apparently feels it *should* rule, that in *every* case involving a labor matter in interstate commerce the state courts lack jurisdiction for any purpose. It is respondent's view that, if it is abundantly clear that conduct in labor relations is neither protected nor condemned by Federal law, a state court may take jurisdiction of the purely local tort or contract relationships brought before it.

It is finally respondent's position that Congress has never purported to deprive the states of their authority to enforce collective bargaining agreements. Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, 61 Stat. 156 merely creates a new possible forum for such suits —to wit, Federal district courts, and the section is plainly permissive both in language and intent.

ARGUMENT

1. Jurisdiction

The opinion sought to be reviewed was that of a department of the state Supreme Court, (Department Number One), as appears on its face, and was signed by five of nine Judges of the Supreme Court of Washington (R. 192 *et seq.*). The record does not reveal any, and in fact there was no, petition for rehearing or petition for hearing *en banc* by Local 174. Such petitions, and the departmental procedure generally, are authorized by the Washington State Constitution, the applicable statutes, and by the Rules on Appeal of the Supreme Court of the State of Washington. See Article IV, Section 2, Washington State Constitution; Revised Code of Washington 2.04.160 (Laws of 1909, Chapter 24, Section 4); Rule 50, Rules on Appeal 34A Wn.(2d) 55.

In the case of *Gorman v. Washington University*, 316 U.S. 98, 62 S. Ct. 962, 86 L. ed. 1300 (1942), we find this statement:

> "Upon examination of the record it appears that the decision and judgment brought here for review were rendered by Division One of the Supreme Court of Missouri, which consists of four of the seven judges of the court. It does not appear that the judgment thus rendered has been reviewed by the Supreme Court sitting en banc or that petitioners have made application, as they could have done under § 4 of the 1890 amendments to Article 6 of the state constitution, to transfer the cause to the full court for review."

This situation is duplicated in the cause at hand. This Court went on to say in the *Gorman* case:

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted. . . . Hence it is the last state tribunal—here the court en banc—to which the cause could be brought for review which is 'the highest court of a state in which a decision could be had' within the meaning of the jurisdictional statute, regardless of the particular description or designation which may be applied to it by state statutes."

The petition was therefore dismissed; a rehearing was subsequently denied. 316 U.S. 711, 62 S.Ct. 1272, 86 L.ed. 1777. We cannot find that this decision has been limited or overruled. We believe it governs the matter at bar and that the Petition should be dismissed, as a matter of law, and also because in principle this Court's jurisdiction should not be invoked until every available remedy below has been sought and denied.

Petitioner argues (see Petitioner's Reply Brief on Petition for Writ of Certiorari, page 3) that a petition for hearing *en banc* would have been "useless." This of course is speculative—we are told about 4% of such petitions are successful in the State of Washington Supreme Court. Be that as it may, the opportunity to seek hearing before all nine judges of that Court was not taken, and until this is done the petitioner has not exhausted its remedies below.

2. Deferring to National Labor Relations Board

In summary petitioner has asserted that the National Labor Relations Board has "initial exclusive jurisdic-

tion to determine whether the strike was an activity protected by § 7 or prohibited by § 8 of the Taft-Hartley Act, and that until the Board determined that the conduct was neither protected nor prohibited, the state court could not entertain jurisdiction of the tort action." (See pages 9 and 10 of Brief for the Petitioner.)

The authority cited by petitioner, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.ed. (2d) 775, 79 S.Ct. 773 (1959) does not so hold. This Court said in that case (359 U.S. at page 244):

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."

To the same effect is *Weber v. Anheuser-Busch*, 348 U.S. 468, 99 L.ed. 546, 75 S.Ct. 480 (1955), and cases cited.

The flaw in petitioner's argument is that petitioner does not, and cannot, show how its conduct can "fairly be assumed" to fall, or even remotely fall, under Sections 7 or 8 of the Taft-Hartley Act.

The stipulated facts are that the strike here in question was an effort to coerce an employer into rescinding the discharge of an incompetent employee whom the employer had discharged in good faith and with good cause. The union, having expressly agreed that the employer had the right to fire an incompetent worker, used its vast economic force in an effort to prevent the employer from exercising this right. Such conduct is coercive and tortious in the State of Washing-

ton, within the meaning of such cases as *Swenson v. Seattle Central Labor Council,* 27 Wn.(2d) 193, 177 P.(2d) 873 (1947) and *Safeway Stores v. Retail Clerks Union,* 184 Wash. 322, 51 P.(2d) 372 (1935). Moreover, by the view of most courts, including the Federal courts, such conduct constitutes a breach of a subsisting contract, at least if the contract contains (as here) a compulsory arbitration clause. *N.A.S.M. v. Stevedores & Longshoremen's Benevolent Soc.* (D.C. La. 1920) 265 Fed. 397; *N.L.R.B. v. Sunset Minerals, Inc.* (C.A. 9, 1954) 211 F.(2d) 224; *United Construction Workers v. Haislip Baking Co.* (C.A. 4, 1955) 223 F.(2d) 872, cert. den. 350 U.S. 847, 100 L.ed. 754, 76 S.Ct. 87; *Lewis v. Benedict Coal Corp.* (C.A. 6, 1958) 259 F.(2d) 346. The National Labor Relations Board agrees; see *W. L. Mead, Inc.,* 113 N.L.R.B. 1040, 36 L.R.R.M. 1392 (1955). See also Cox, Some Aspects of the Labor Management Act of 1947, 61 Harv. L. Rev. 274, 308 (1948). For collected cases see 2 A.L.R.(2d) 1278, 1281, and the A.L.R.(2d) Series Supplement, Vol. 1 at page 112.

The petitioner has agreed in its brief that "the protection which § 7 of the Act affords to strikers is withdrawn if the strike is in violation of an existing collective bargaining contract." See page 18 of Brief for the Petitioner. The Washington Supreme Court, applying the rule just referred to, found here that there was a violation of the contract. It follows as a matter of law that § 7 of the Taft-Hartley Act did not protect the activities which were dealt with below.

This view is buttressed by the additional fact that in any event the strike here was found not to be for mutual aid and protection but rather was called at the

personal whim of a business agent. See Finding of Fact VII (R. 188, 189):

> "The Court, notwithstanding said award (of arbitrators), and over objections of plaintiff's (respondent's) counsel, allowed the introduction of evidence bearing on the good faith of defendant (petitioner) in picketing plaintiff's place of business. The Court expressly finds, from all of said evidence, the picketing was the result of the decision of aforesaid Floyd Anderson (petitioner's business agent); that the defendant has not disputed nor did it dispute at the trial its responsibility for the acts and conduct of said Floyd Anderson; *that said Floyd Anderson was motivated by something other than the union's mutual aid and protection;* and that the defendant union has failed to produce evidence of sufficient weight to satisfy the burden of proof in support of its affirmative defense that the union acted justifiably under the the circumstances." (Emphasis and parentheses added)

As to whether petitioner's conduct was condemned by Section 8 of the Taft-Hartley Act, a careful examination of that section will fail to reveal any portion which even indirectly condemns petitioner's conduct in this case as an unfair labor practice. Certainly a breach of a labor agreement is not, *per se,* an unfair labor practice. *McCarroll v. Los Angeles County (etc.)* (Calif. 1957) 315 P.(2d) 322, cert. den. 355 U.S. 932, 2 L.ed.(2d) 415. As pointed out in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 1 L.ed.(2d) 972, 77 S.Ct. 912 (1957), the N.L.R.B. is not the proper forum for disputes arising out of breaches of labor contracts, unless the breaches are also unfair labor practices as defined by Federal law.

This is not to say that by imaginative logic it might not be possible to find something about petitioner's conduct which was remotely covered under Sections 7 or 8 of the Taft-Hartley Act. However, a mere "argumentative coincidence in the facts" with a plausible N.L.R.B. action does not destroy state jurisdiction. *I.A.M. v. Gonzales,* 356 U.S. 617, 2 L.ed.(2d) 1018, 78 S.Ct. 923 (1958). In the *Garmon* case, on which petitioner primarily relies, the adjudication in the state court was not remotely but directly based "on the assumption that the behavior of the petitioning unions constituted an unfair labor practice" under Federal law. 359 U.S. 236 at page 245.

The balance of petitioner's argument on this issue assumes factual matters which do not accord with the record here. Thus in arguing that the strike here was "economic," the petitioner is asking the United States Supreme Court to assume a theory of the facts that by stipulation and arbitration was rejected below. Unless *all* cases involving labor in interstate commerce are to be held beyond the jurisdiction of state courts, a view never adopted by this Court or suggested by Congress, then the present matter falls as squarely as possible into an area still reserved to state action—i.e., coercive and tortious conduct in cynical breach of contract, under circumstances where neither Section 7 nor Section 8 of the Act applies.

The petitioner says that the *Board* should determine whether the contract was breached. This certainly is not a function vested in the Board by any part of Federal law, nor was it the intention of Congress.

"Once parties have made a collective bargaining

contract, the enforcement of that contract should be left to the usual processes of the law and not to to the NLRB." H. Conference Rep. No. 510, 80th Congress, 1st Session, page 42.

As the Board has itself said:

"The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms." *United Telephone Company*, 112 N.L.R.B. 779 (1955).

3. Breach of Contract

The burden of petitioner's argument is that § 301 of the Act deprived the state court, if not of jurisdiction (and petitioner apparently doesn't argue this), at least of any right to apply *state* law of contract to cases involving breaches of collective bargaining contracts. The only authority cited is *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L.ed.(2d) 972, 77 S.Ct. 912 (1957), which however merely held that *Federal* substantive labor policy governs suits brought under § 301 in *Federal* courts. Nothing in § 301, however, purports to limit *state* courts enforcing contracts under *state* law. No decision of this Court so holds.

The argument is only academic, however, because in holding petitioner union's conduct to be in breach of contract, the Washington Supreme Court ruled squarely in accord with the rule of the *Federal* courts. Although the contract between the parties (Pl. Ex. 1, R. 202 *et seq.*) does not expressly prohibit strikes, yet—assuming the employer is not in breach itself, something not shown here—this is necessarily implied.

"As a general proposition, the right to strike and picket, though otherwise recognized, cannot be ex-

ercised during the life of a valid collective labor agreement which fails by its terms to preserve such rights."

2 A.L.R.(2d) 1278, 1281, citing many cases.
See also more recent cases cited in A.L.R.(2d) Series Supplement, Vol. 1, at page 112.

Obviously, this is the basic consideration to the employer of every labor contract. *N.A.S.M. v. Stevedores & Longshoremen's Benevolent Soc.* (D.C. La. 1920) 265 Fed. 397.

Even more clearly this is the rule where, as here, there is an arbitration clause, which would be meaningless if the labor union may without arbitration apply economic sanctions to obtain wages or conditions more favorable than provided by its contract before the latter's expiration. We again emphasize the fact that it is a *conclusive* fact, *stipulated* by the union herein, that the picketing in this case was to force the respondent company to re-employ a worker discharged as unsatisfactory although the worker was in fact unsatisfactory and discharged for that reason and in good faith (Pl. Ex. 12, pages 7 and 8, R. 211 *et seq.*).

"It is argued that a strike could not constitute a breach of a contract which did not contain a no strike clause; but we think it clear that the purpose of the contract was to require the settlement of disputes and grievances by a procedure which would not cause the disruption of business that would necessarily result from a strike and that a strike without following such procedure was necessarily a breach." (Cases cited) *United Construction Workers v. Haislip Baking Co.* (4th Cir. 1955) 223 F.(2d) 872, at 876, 877; cert. den. 350 U.S. 347.

In *Lewis v. Benedict Coal Corp.* (6th Cir., 1958) 259 F.(2d) 346, a contract contanied both a "no-strike" provision and an arbitration clause; the "no-strike" provision was abrogated by the parties; nonetheless a strike during the life of the contract was held to be a breach. See also *N.L.R.B. v. Sunset Minerals, Inc.* (9th Cir., 1954) 211 F.(2d) 224, and *W. L. Mead, Inc.*, 113 N.L.R.B. 1040 (1955), *supra*.

Petitioner evidently argues that this line of authority merely helds that a court should search the whole record to "determine whether the words implied an agreement not to strike." (See page 33 of Brief for the Petitioner). If so, there is certainly no showing that the Washington Court didn't do so. On the contrary that court held, what surely is manifest, that this strike

> " . . . was an attempt to force the respondent to forego the exercise of a right expressly provided by the agreement . . . "

and therefore a breach. (R. 195).

We suggest that petitioner's whole attempt to re-try in the United States Supreme Court an essentially factual issue—what constitute the implied obligations of a party to a contract—is addressed to the wrong tribunal. Petitioner raised all the same arguments to a board of arbitrators (including petitioner's own nominee, a Teamster official who failed to dissent from the decision of the arbitration board), to the trial court, and to a department of the state Supreme Court.

CONCLUSION

This proceeding should be dismissed in this Court for lack of jurisdiction, or in the alternative, the deci-

sion of the Supreme Court of Washington should be upheld.

Respectfully submitted,

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